

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

OFFICE OF THE
GENERAL COUNSEL
2009 JUN 16 PM 3:05
U.S. PATENT
AND
TRADEMARK OFFICE

ODOM'S TENNESSEE PRIDE SAUSAGE, INC.)
)
Appellant,)
)
v.)
)
FF ACQUISITION, L.L.C.)
)
Appellee.)

Appeal No.

NOTICE OF APPEAL

Odom's Tennessee Pride Sausage, Inc. hereby appeals the court for review of the Order Granting Applicant FF Acquisition, L.L.C.'s Motion for Summary Judgment and Dismissing Opposition with Prejudice of the U.S. Patent and Trademark Office Trademark Trial and Appeal Board in Opposition No. 91/182,173, entered on April 17, 2009. The Order was received on April 17, 2009. A copy is attached.

ODOM'S TENNESSEE PRIDE SAUSAGE, INC.

BY:



Marsha G. Gentner
JACOBSON HOLMAN PLLC
400 Seventh Street, N.W.
Washington, D.C. 20004
(202) 638-6666
Fax: (202) 393-5350
mgentner@jhip.com

Attorneys for Appellant

Date: June 16, 2009

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of June, 2009, the foregoing Notice of Appeal of Odom's Tennessee Pride Sausage, Inc. was served, by mailing same first class and postage prepaid, on the following correspondent:

Scott W. Johnston, Esquire
Merchant & Gould P.C.
80 South Eighth Street
Suite 3200
Minneapolis, Minnesota 55402-0910

Teresa L. Brooks

**THIS OPINION
IS NOT A PRECEDENT
OF THE T.T.A.B.**

**UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451**

Lykos

Mailed: April 17, 2009

Opposition No. 91182173

Odom's Tennessee Pride
Sausage, Inc.

v.

FF Acquisition, L.L.C.

Before Rogers, Holtzman and Mermelstein, Administrative
Trademark Judges.

By the Board:

On July 31, 2003, applicant applied to register the
mark displayed below



for "retail grocery store services" in International Class
35.¹ Opposer has opposed registration on the grounds that
applicant's mark so resembles opposer's previously used and

¹ Application Serial No. 77148503, alleging March 28, 2007 as the
date of first use anywhere and in commerce.

registered marks that it is likely to cause confusion, mistake, or deceive prospective consumers within the meaning of Section 2(d) of the Lanham Act. In its notice of opposition, opposer pleaded ownership of several federally registered marks, including the following:²



² Registration No. 885136, registered on January 27, 1970, for "sausage, [ham, bacon,] souse [, and lard]" in International Class 29, alleging April 3, 1957, as the date of first use anywhere and June 1968 as the date of first use in commerce, Section 9 renewal granted.

Registration No. 1859824, registered on October 25, 1994, for "sausage in roll, link and patty form; souse; barbequed pork; barbequed beef; head cheese; and prepared breakfast entrees consisting primarily of eggs, sausage, and cheese" in International Class 29, and "gravy; prepared breakfast entrees consisting primarily of biscuit sandwiches; and prepared breakfast entrees consisting primarily of biscuits and gravy" in International Class 30, alleging December 15, 1993, as the date of first use anywhere and in commerce.

Registration No. 3019156, registered on November 29, 2005, for "fresh sausage rolls, links and patties; fresh souse; fully cooked sausage links and patties; sausage ball appetizers" in International Class 29 and "frozen breakfast sandwiches; frozen appetizers, namely, sausage hot dog sandwiches, wraps and swirls; and gravy" in International Class 30, alleging 1943 as the date of first use anywhere and in commerce.

Opposer also pleaded ownership of these marks:³



Applicant, in its answer to the notice of opposition, denied the salient allegations and asserted the affirmative defenses of laches, estoppel and acquiescence.

³ Registration No. 3200875, registered on January 23, 2007, for "fresh sausage rolls, links and patties; fully cooked sausage links and patties; appetizers consisting primarily of meat, namely, sausage balls, hot dog sandwiches, wraps and swirls" in International Class 29 and "frozen breakfast sandwiches; gravy" in International Class 30, alleging March 2003 as the date of first use anywhere and in commerce.

Registration No. 3200845, registered on January 23, 2007, for "fresh sausage rolls, links and patties; fully cooked sausage links and patties; appetizers consisting primarily of meat, namely, sausage balls, hot dog sandwiches, wraps and swirls" in International Class 29 and "frozen breakfast sandwiches" in International Class 30, alleging March 2003 as the date of first use anywhere and in commerce.

Registration No. 2850472, registered on June 8, 2004, for "breakfast sandwiches, namely sausage and biscuit sandwiches" in International Class 30, alleging November 1, 2002 as the date of first use anywhere and in commerce, and Registration No. 3019210, registered on November 29, 2005 for "frozen breakfast sandwiches" in International Class 30, alleging May 2002 as the date of first use anywhere and in commerce.

This case now comes before the Board for consideration of applicant's motion for summary judgment on (1) opposer's claim of likelihood of confusion, and (2) applicant's equitable affirmative defense of laches pursuant to *Morehouse Mfg. Corp. v. Strickland & Co.*, 407 F.2d 881, 160 USPQ 715 (CCPA 1969) ("*Morehouse defense*"). The parties have fully briefed the motion.

Summary judgment is an appropriate method of disposing of cases in which there are no genuine issues of material fact in dispute, thus leaving the case to be resolved as a matter of law. See Fed. R. Civ. P. 56(c). A party moving for summary judgment has the burden of demonstrating the absence of any genuine issues of material fact, and that it is entitled to summary judgment as a matter of law. See *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). The evidence must be viewed in a light favorable to the non-movant, and all justifiable inferences are to be drawn in the non-movant's favor. See *Lloyd's Food Products Inc. v. Eli's Inc.*, 987 F.2d 766, 25 USPQ2d 2027 (Fed. Cir. 1993); *Opryland USA Inc. v. Great American Music Show Inc.*, 970 F.2d 847, 23 USPQ2d 1471 (Fed. Cir. 1992).

For the reasons set forth below, we find that applicant has satisfied its burden of establishing the absence of any genuine issues of material fact with regard to the dissimilarity of opposer's marks and applicant's mark, and

that applicant is therefore is entitled to judgment as a matter of law dismissing the likelihood of confusion claim under Section 2(d).

Based upon the factual circumstances presented in this case, we find *Kellogg Co. v. Pack'em Enterprises, Inc.*, 14 USPQ2d 1545 (TTAB 1990), *aff'd*, 951 F.2d 330, 21 USPQ2d 1142 (Fed. Cir. 1991) ("Kellogg"), to be controlling. In *Kellogg*, the Court of Appeals for the Federal Circuit affirmed the Board's determination that even considering all other relevant *duPont* factors in opposer's favor, the single *duPont* factor of the dissimilarity of the marks at issue in that case outweighed the other relevant *duPont* factors, and was therefore dispositive on the issue of likelihood of confusion.

Similarly here, even considering all other relevant *duPont* factors in opposer's favor, we find that applicant's applied-for mark is so dissimilar to opposer's pleaded marks that no likelihood of confusion can exist as a matter of law. See also *Champagne Louis Roederer S.A. v. Delicato Vineyards*, 148 F.3d 1373, 47 USPQ2d 1459 (Fed. Cir. 1998) ("one *du Pont* factor may be dispositive in a likelihood of confusion analysis, especially when that single factor is the dissimilarity of the marks").

While both parties' design marks consist of smiling boys wearing hats (and in some instances both waiving one

hand), this is where the similarities end. Opposer's marks depict a barefoot child holding a fishing pole. The boy is wearing a tall pilgrim hat with a ribbon directly above the brim. The boy's feet are small and narrow. By contrast, applicant's mark depicts a boy facing forward wearing a short, wide brimmed cowboy hat. This boy is wearing thick boots, has thick hands, and has a piece of straw in his mouth. The boy depicted in opposer's marks has nothing in his mouth. These visual distinctions are sufficient to create different commercial impressions of the marks, thereby precluding a finding of likelihood of confusion.

In view of our determination on likelihood of confusion, we need not reach the issue of whether summary judgment based on the *Morehouse* defense is appropriate in this case. Accordingly, applicant's motion for summary judgment is granted, and the opposition is dismissed with prejudice.

NEWS FROM THE TTAB:

The USPTO published a notice of final rulemaking in the Federal Register on August 1, 2007, at 72 F.R. 42242. By this notice, various rules governing Trademark Trial and Appeal Board inter partes proceedings are amended. Certain amendments have an effective date of August 31, 2007, while most have an effective date of November 1, 2007. For further information, the parties are referred to a reprint of the final rule and a chart summarizing the affected rules, their changes, and effective dates, both viewable on the USPTO website via these web addresses:

<http://www.uspto.gov/web/offices/com/sol/notices/72fr42242.pdf>

http://www.uspto.gov/web/offices/com/sol/notices/72fr42242_FinalRuleChart.pdf

By one rule change effective August 31, 2007, the Board's standard protective order is made applicable to all TTAB inter partes cases, whether already pending or commenced on or after that date. However, as explained in the final rule and chart, this change will not affect any case in which any protective order has already been approved or imposed by the Board. Further, as explained in the final rule, parties are free to agree to a substitute protective order or to supplement or amend the standard order even after August 31, 2007, subject to Board approval. The standard protective order can be viewed using the following web address:

<http://www.uspto.gov/web/offices/dcom/ttab/tbmp/sindaqmnt.htm>